

MOTION FILED

No. 82-1167

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

Petitioner,

VS.

BRADLEY THOMAS JACOBSEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF
AS AMICI CURIAE IN SUPPORT OF PETITIONER

AND
BRIEF AMICI CURIAE OF
AMERICANS FOR EFFECTIVE LAW
ENFORCEMENT, INC.

JOINED BY

THE INTERNATIONAL ASSOCIATION OF CHIEFS
OF POLICE, INC., THE INTERNATIONAL NARCOTIC
ENFORCEMENT OFFICERS ASSOCIATION, THE LEGAL
FOUNDATION OF AMERICA, AND THE MINNESOTA
CHIEFS OF POLICE ASSOCIATION
IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	PAGE
Table of Authorities.....	ii
Motion for Leave to File a Brief as Amici Curiae in Support of Petitioner.....	iii
Interest of Amici Curiae and Our Reasons for Desiring to File in the Instant Case.....	iv
Summary of Argument.....	2
Argument	3
A CHEMICAL FIELD TEST TO DETERMINE WHETHER A SUSPICIOUS SUBSTANCE THAT HAS PROPERLY COME INTO THE HANDS OF LAW ENFORCEMENT OFFI- CERS IS CONTRABAND, DOES NOT IN- VADE A CONSTITUTIONALLY PRO- TECTED PRIVACY INTEREST AND DOES NOT CONSTITUTE A SEARCH UNDER THE FOURTH AMENDMENT	3
Conclusion.....	11

TABLE OF AUTHORITIES

	PAGE
<i>Cases</i>	
<i>Burdeau v. McDowell</i> , 256 U. S. 465 (1921)	3
<i>Coolidge v. New Hampshire</i> , 403 U. S. 443 (1971) .	3
<i>Davis v. Mississippi</i> , 394 U. S. 721 (1969).....	8
<i>People v. Adler</i> , 50 N. Y. 2d 730, 409 N. E. 2d 888, cert. den., 449 U. S. 1014 (1980).....	4, 5
<i>United States v. Andrews</i> , 618 F. 2d 646 (10th Cir.), cert. den., 449 U. S. 824 (1980).....	4
<i>United States v. Barry</i> , 673 F. 2d 912 (6th Cir. 1982).....	4, 5
<i>United States v. Jacobsen</i> , 683 F. 2d 296 (8th Cir. 1982).....	v
<i>United States v. Knotts</i> , ____ U. S. ____, 103 S. Ct. 1081, 51 LW 4232, 32 CrL 3069 (1983)...	5
<i>Walter v. United States</i> , 447 U. S. 649 (1980)	vi, 3, 4

Books and Reports

Moenssens and Inbau, SCIENTIFIC EVIDENCE IN CRIMINAL CASES (Foundation Press, Mineola, N. Y., Second Edition, 1978)	5, 6
<i>Training Bulletin</i> , United States Department of Justice, Drug Enforcement Administration (DEA), North Central Regional Laboratory	6-8
<i>Chart</i> , Summary of Chemical Drug Tests, United States Department of Justice, Drug Enforcement Administration (DEA), Chicago, Illinois	9

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**MOTION FOR LEAVE TO FILE A BRIEF
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Americans for Effective Law Enforcement, Inc., joined by the International Association of Chiefs of Police, Inc., the International Narcotic Enforcement Officers Association, the Legal Foundation of America, and the Minnesota Chiefs of Police Association, respectfully move this Court for leave to file a brief, *amici curiae*, in support of the petitioner in this case.

This motion is made pursuant to Rule 36.3 of the Supreme Court Rules. Consent to file has been granted by Hon. Rex E. Lee, Solicitor General, United States Department of Justice, Counsel for Petitioner, and refused by Mark W. Peterson, Attorney-at-Law, Minneapolis, Minnesota, Counsel for Respondents; consequently we are moving this Court directly for leave to file. Letters of Counsel have been filed with the Clerk of this Court. The interest of the *amici curiae* and our reasons for desiring to file are set forth below.

INTEREST OF AMICI CURIAE AND OUR REASONS FOR DESIRING TO FILE IN THE INSTANT CASE.

I. INTEREST OF THE AMICI CURIAE

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operations of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* fifty-two times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 75 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

THE INTERNATIONAL NARCOTIC ENFORCEMENT OFFICERS ASSOCIATION is a service organization of peace officers and related personnel from around the world engaged in narcotic law enforcement. Its goals include the enhancement of the professional performance of its members that will more effectively carry out the proper concerns of government in the eradication of the drug problem afflicting our society, in a manner consistent with the preservation of constitutionally protected liberties. The Association has more than 7,500 members in 76 countries and publishes a monthly magazine called "International Drug Report."

THE LEGAL FOUNDATION OF AMERICA is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. The Foundation does not accept private fees and is supported by grants from the public.

THE MINNESOTA CHIEFS OF POLICE ASSOCIATION, is a not-for-profit Minnesota association and consists of over 300 members who are Minnesota police chiefs and senior law enforcement executives. It seeks to represent in our courts the concern of police administrators with the problems of crime and police effectiveness in dealing with crime, with special emphasis upon the problems and concerns of police officers who face numerous legal and practical problems on a day-by-day basis in their efforts to protect public safety.

II. REASONS FOR DESIRING TO FILE A BRIEF AMICI CURIAE IN THE INSTANT CASE.

Amici's interest in the instant case arises from the compelling constitutional and policy questions pertaining to the routine functions of narcotic law enforcement officers at all levels as they relate to field testing of suspicious substances and as they may be adversely affected by the decision and opinion of the court below reported as *United States v. Jacobsen*, 683 F. 2d 296 (8th Cir. 1982). The Court in *Jacobsen* held that a federal Drug Enforcement Agent violated the Fourth Amendment when, after being apprised that a private freight carrier had opened a suspicious package and visually inspected a white powder found inside, the agent, acting without a warrant, performed a non-intrusive chemical field test upon the powder that revealed that the powder was cocaine.

Amici believe that the ruling of the court below is a wholly unwarranted extension of the principles embodied in the Fourth Amendment. The ruling is also an example of the confusion and uncertainty that exist in law enforcement circles as a result of this Court's decision in *Walter v. United States*, 447 U. S. 649 (1980), and we respectfully ask that that decision be reversed or limited to its facts.

Amici will point out in its brief that routine field tests performed by law enforcement officers to determine the chemical nature of suspected substances that have properly come into their view or possession do not constitute a search under the Fourth Amendment. Such tests are quick and perfunctory; in most cases requiring no movement of the suspected substance. Standard operating procedures developed by law enforcement agencies for the conduct of such tests are unobtrusive and invade no constitutionally protected privacy interests of a defendant. *Amici* will request this Court to recognize such tests as appropriate investigative procedures and to exempt them from the operation of the Fourth Amendment. The inability of law enforcement agencies to perform such tests as indicated raises the possibility that in some cases contraband and dangerous substances may go undetected by the authorities. *Amici* believe that our unique perspective as law enforcement professional organizations, with our constituency of thousands of working investigative officers and executives, will aid the Court in resolving the legal and policy issues in this case.

We, therefore, respectfully move the Court for leave to file as *amici curiae* in this case.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE

Our interest has been set forth above at page iv in our motion to file this brief as *amici curiae*.

SUMMARY OF ARGUMENT

Routine field tests performed by law enforcement officers to determine the chemical nature of suspected substances that have properly come into their view or possession do not constitute a search under the Fourth Amendment. Such tests are quick and perfunctory; in most cases requiring no movement of the suspected substance. Standard operating procedures developed by law enforcement agencies for the conduct of such tests are unobtrusive and invade no constitutionally protected privacy interests of a defendant. *Amici* request this Court to recognize such tests as appropriate investigative procedures and to exempt them from the operation of the Fourth Amendment. The inability of law enforcement agencies to perform such tests as indicated raises the possibility that in some cases contraband and dangerous substances may go undetected by the authorities.

ARGUMENT

A CHEMICAL FIELD TEST TO DETERMINE WHETHER A SUSPICIOUS SUBSTANCE THAT HAS PROPERLY COME INTO THE HANDS OF LAW ENFORCEMENT OFFICERS IS CONTRABAND, DOES NOT INVADE A CONSTITUTIONALLY PROTECTED PRIVACY INTEREST AND DOES NOT CONSTITUTE A SEARCH UNDER THE FOURTH AMENDMENT.

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. has been privileged to file, as noted, many *amicus curiae* briefs with this Court. In many of them, as in the present one, it has been joined by the INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., and other national and state law enforcement groups. Those briefs have usually presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, while at the same time not impinge upon basic constitutional protections. In the present brief, for reasons that follow, we are dispensing with an extended analysis of the case law. We confine our brief basically to a suggested resolution of the important policy issue involved in this case as it pertains to the serious problem of narcotic law enforcement in this country.

Amici believe that the facts of this case, as revealed in the record, and in the opinion of the court below, fully support a conclusion that the law enforcement conduct, up to the point of confronting the substance in question, did not exceed the scope of the private search, and therefore, under the doctrine of *Coolidge v. New Hampshire*, 403 U. S. 443 (1971) and *Burdeau v. McDowell*, 256 U. S. 465 (1921), the acquisition of the suspicious substance did not violate the Fourth Amendment. The court below, however, relying upon *Walter v. United States*, 447 U. S. 649 (1980), has taken the position that the activity of the federal agents was a significant extension of the private search because it revealed the composition of the

powder. It is apparently the view of the court below that placing a drop of chemical upon suspicious powder is constitutionally equivalent to taking a reel of film, setting up a screen and projector, and viewing the film.

Amici note that the decision in *Walter* was based upon a plurality opinion. It is arguable that the Court's decision in that case was based solely upon the Fourth Amendment, because the governmental scrutiny went beyond the scope of the private search at the time when the federal agents screened the films that had been discovered by the private carrier. It is more likely that the five Justices who agreed upon the result in *Walter* did so on the ground that First Amendment rights of the defendant were implicated by the screening of the films suspected of containing pornographic subject matter. Other courts have reached the same conclusion. For example, in *United States v. Barry*, 673 F. 2d 912 (6th Cir. 1982), the court distinguished *Walter* on the grounds that the films in *Walter* were protected by the First Amendment and that the chemical field testing involved in *Barry* was not as significant an investigation as the viewing of films. Also, additional cases have had no difficulty in reaching the conclusion that chemical field testing is so unobtrusive as to obviate an extension of the Fourth Amendment probable cause or warrant requirements — e.g., *People v. Adler*, 50 N. Y. 2d 730, 409 N. E. 2d 888, *cert. den.*, 449 U. S. 1014 (1980); *United States v. Andrews*, 618 F. 2d 646 (10th Cir.), *cert. den.*, 449 U. S. 824 (1980).

Amici submit that this Court should either overrule *Walter* as wrongly decided, or make clear that it is based upon the interplay of the First and the Fourth Amendments, and thereby confine its precedential value to its unique set of facts. Until such decisive action is taken, state and federal courts will continue to be plagued by problems in applying *Walter* to private searches leading to the turnover of evidence to law enforcement agencies, especially in cases that do not involve materials protected by the First Amendment.

We submit, however, that this Court can end the inquiry most directly by an application of common sense in concluding that the field test of the suspicious material was simply not a search. Such a test is no more than a sensory enhancement procedure that reveals to the trained law enforcement officer the exact chemical nature, and, therefore, criminal nature, if any, of the questioned substance. As this Court noted in *United States v. Knotts*, ____ U. S. ____, ____, 103 S. Ct. 1081, 1086, 51 LW 4232, 4234, 32 CrL 3069, 3071 (1983), "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case", referring to the so-called "bumper-beeper" attached to the defendant's vehicle for tracking purposes.

As noted by the court in the previously discussed case of *United States v. Barry*, 673 F. 2d 912, 920, which involved facts similar to those in the instant case, chemical field tests of suspicious substances are not only "routine", but actually "perfunctory." The court in *People v. Adler*, 50 N. Y. 730, 737, 409 N. E. 2d 888, 891, n. 4, correctly stated that "[un]less we are prepared to hold that there is a reasonably [sic] and justifiable expectation of privacy in the contents of a pill capsule, it cannot be said that an intrusion into privacy interests was effected by scientifically examining the drugs."

Describing similar methods used in the laboratory, the authors of *SCIENTIFIC EVIDENCE IN CRIMINAL CASES* (Foundation Press, Mineola, N.Y., Second Edition, 1978), by Moenssens and Inbau, at p. 288, state that, "[t]hese tests involve the treatment of the suspect sample with a chemical reagent and a notation of reactions such as color change, etc." Such a test can be accomplished simply by dropping a small quantity of chemical on the substance and observing its change of color. To the trained law enforcement officer, the change of color, or other reaction, may reveal the narcotic nature of the

substance. For example, by treating a substance suspected of being cocaine with platinum chloride, if feathery, pale-yellow crystals appear, the trained law enforcement officer would know that the substance is cocaine. Similarly, gold chloride applied to cocaine would produce long, rod-like crystals with short arms extending at right angles. "Colorwise, cobalt thiocyanate produces a blue flaky precipitate [when applied to cocaine]." Moenssens and Inbau, *SCIENTIFIC EVIDENCE IN CRIMINAL CASES*, *supra*, at p. 325. It is important to note for Fourth Amendment purposes, that field tests typically involve no sniffing or tasting of the suspected substance, no lengthy detention of the substance, and, moreover, it need not be picked up or moved from the place where it is found or obtained by the law enforcement officer.

The following procedures for conducting such tests have been prepared by the United States Department of Justice, Drug Enforcement Administration (DEA), North Central Regional Laboratory. They demonstrate the relative simplicity of such tests and their unobtrusive character.

Chemical field tests are qualitative examinations which give valuable clues as to the identity of samples. The field tests listed below are easy to perform and not too time consuming. They are, however only precursory and presumptive. False positives can be obtained with all field tests. Any drugs which will be used as evidence must be positively identified by a qualified chemist. Additionally, a negative test does not preclude the possibility of another federally controlled drug being present.

CAUTION: Law enforcement personnel should take extreme care in handling samples. Do not taste or sniff drugs. Wash hands thoroughly after handling samples. Do not place hands in or on mouth prior to washing hands.

Examples:

AMPHETAMINES

Test Materials:

Marquis Reagent.

Test Procedure: Add a few drops of the Marquis reagent to a small portion of the powder or crushed tablet or capsule material.

Color Reactions:

Amphetamines react with the reagent to give a red-orange color, turning reddish-brown and then dark brown within one or two minutes.

The reagent gives this characteristic color reaction when applied to white, pink, yellow, or green amphetamine tablets. The red-orange color forms immediately on some tablets while with others it appears in 10 or 20 seconds. Therefore, the critical period of color differentiation for amphetamines is within the first 20 seconds.

Other non-controlled substances chemically similar to amphetamines will also react with Marquis to give an orange color turning to brown.

Mescaline will turn orange-red, and the color remains.

COCAINE, DEMEROL, METHADONE, HEROIN, AND PCP

Test Materials:

Acid Cobalt Thiocyanate Reagent—Dissolve 1 gram of Cobalt Acetate, Nitrate or Chloride and 1.5 gms of Potassium Thiocyanate in 90 ml water and 10 ml acetic acid (glacial).

Color Reaction:

PCP—Blue-green specks within the pink solution
Cocaine, Demerol, Methadone, and Heroin—intense blue flaky precipitate which remains after swirling.

NOTE: Many substances will give a blue colored solution but not the flaky precipitate. Some substances such as methapyrilene and quinine will give a blue precipitate which disappears after swirling the spot plate.

Training Bulletin, United States Department of Justice, Drug Enforcement Administration (DEA), North Central Regional Laboratory, 610 South Canal Street, Chicago, Illinois.

A large number of specific field tests have been developed by the DEA and private testing laboratories for a wide range of controlled substances. The chart appearing on page 9 summarizes such tests and their results.

Amici submit that common sense dictates that the procedure involved in the instant case is truly *de minimis* and not deserving of Fourth Amendment protection. It is a necessary investigative procedure, without which probable cause to believe that the substance is contraband would be impossible to obtain. Without such tests law enforcement officers would be compelled to abandon any further investigation of the suspicious substance. No mechanism for judicial authorization to conduct such a test exists, as might be suggested by *Davis v. Mississippi*, 394 U. S. 721 (1969), nor should such authorization be required if the procedure is not a search within the purview of the Fourth Amendment.*

* Requiring law enforcement officers to obtain judicial authorization to conduct field tests would, in many cases, mean that the premises would have to be secured until a magistrate could be found to issue such authorization. In effect, this securing of the scene—during which no one would be allowed to leave the premises—would pose a greater inconvenience and a real invasion of the right to privacy of the occupants of such premises, as compared to an immediate and unobtrusive field test as described in this brief.



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SUMMARY OF CHEMICAL DRUG TESTS

<u>MATERIAL</u>	<u>REAGENT*</u>	<u>COLOR REACTION</u>
Amphetamine	Marquis	Dark Orange-Brown
Aspirin	Marquis	Light Strawberry Pink
Barbiturates	Dille-Koppanyi	Light Blue-Violet
Caffeine	Marquis	Brown, on standing
Cocaine	Cobalt Thiocyanate	Blue Flakes or precipitate
Codeine	Marquis	Violet to Blue
Darvon	Marquis	Blood Red-Purple
Demerol	Cobalt Thiocyanate	Blue Flakes
Dilaudid	Marquis	Purple
Hashish	Duquenois	Violet
Heroin - White -	Marquis	Purple
Brown -	"	Purple
Brown	Meckes, modified	Green
Lactose	Marquis	None (White Swirl)
Lidocaine	Cobalt Thiocyanate	Blue Solution, no solids
LSD	Erichs	Blue-Purple
Manitol	Marquis	None
Marihuana	Duquenois	Violet
Mescaline	Marquis	Orange-Red
Methadone	Cobalt Thiocyanate	Blue Flakes
Morphine	Marquis	Purple
Opium	Marquis	Purple
PCP (Phencyclidine)	Cobalt Thiocyanate	Blue Specks
Procaine	Cobalt Thiocyanate	Blue Solution, no solids
Quinine	Marquis	Light Yellow
Tea	Duquenois	None; Chloroform Layer
THC	Duquenois	Blue-Violet
Tobacco	Duquenois	None; Chloroform Layer

* Field Test Kits are manufactured by several companies in various forms. Those being used are the "NIX" brand produced by: Becton, Dickinson, and Company, Public Safety Division, 1912 E. Randol Mill Road, Arlington, Texas, 76011.

Cobalt Thiocyanate	-	NIX Test G (Scott Test)
Dille-Koppanyi	-	NIX Test C
Duquenois	-	NIX Test E
Erichs	-	NIX Test D
Marquis	-	NIX Test A
Meckes	-	NIX Test K
Meckes, modified	-	NIX Test L

The consequences of prohibiting law enforcement officers from conducting chemical field tests immediately could be devastating where it is suspected that the substance might also be dangerous. We should not so strain the application of the Fourth Amendment as to require law enforcement officers to turn their backs on suspicious substances that might be of an explosive or otherwise endangering nature, such as leaking barrels of what could be toxic chemicals spilling on a highway as a result of an accident. Nor should the police have to turn their backs from a latent substance suspected of being a narcotic under circumstances similar to those that prevailed in the instant case. We ask this Court to exempt such routine, but necessary, investigative processes from the reach of the Fourth Amendment.

CONCLUSION

Amici respectfully submit that the decision of the United States Court of Appeals, Eighth Circuit, should be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

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